6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2019–0215; FRL–8999–03–R5]

Air Plan Approval; Michigan; Partial Approval and Partial Disapproval for Infrastructure SIP Requirements for the 2015 Ozone NAAQS; Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; correction.

SUMMARY: This action corrects an omission of timely comment and response in the September 28, 2021, Environmental Protection Agency (EPA) partial approval/partial disapproval of elements of a State Implementation Plan (SIP) submission from Michigan to address the infrastructure requirements of section 110 of the Clean Air Act (CAA) for the 2015 ozone National Ambient Air Quality Standards (NAAQS). Accordingly, this action amends the effective date of the final approval to reflect EPA's current response to the previously omitted comment.

DATES: This final rule is effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT: Olivia Davidson, Environmental Scientist, Attainment Planning and Maintenance Section, Air Programs Branch (AR18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886-0266, *davidson.olivia@epa.gov.*

SUPPLEMENTARY INFORMATION: On July 2, 2021 (86 FR 35247), EPA proposed to approve most elements and disapprove an element of a SIP submission from the Michigan Department of Environment, Great Lakes, and Energy (EGLE) to address the required infrastructure elements of sections 110(a)(1) and (2), as applicable, for the 2015 ozone NAAQS. EPA provided an explanation of the CAA requirements, a detailed analysis of the submission, and EPA's reasons for proposing approval, in the notice of proposed rulemaking (NPRM) and will not be restated here. The public comment period for this proposed rule ended on August 2, 2021. In the final rule published in the *Federal Register* on September 28, 2021 (86 FR 53550), EPA mistakenly omitted comments submitted by Sierra Club in our response to comments. EPA received the comment letter on August 2, 2021 shortly before the end of the comment period. This comment letter submitted by Sierra Club is summarized below along with EPA's responses.

Comment: Sierra Club commented that EPA should examine whether Michigan has met the requirement of CAA sections 110(a)(2)(A) and 110(a)(2)(E)(i), 42 USC 7410(a)(2)(A) and 7410(a)(2)(E)(i), in light of a 2017 Michigan Court of Claims opinion, *United States Steel Corp. v. Dept. of Environmental Quality*, No. 16-000202-MZ, 2017 WL 5974195 (Mich. Ct. Cl. Oct. 4, 2017), that invalidated Michigan Administrative Code (MAC) 336.1430 ("Rule 430"). The commenter noted that Michigan promulgated Rule 430 in an effort to bring the Detroit area into

attainment with the 2010 1-hour primary sulfur dioxide (SO_2) NAAQS, by placing SO_2 emission limits on a single facility. The commenter further noted that the Court invalidated Rule 430 because the limits applied to a single facility, thus failing the "general applicability" requirement of Michigan's Administrative Procedures Act, MCL 24.201 et seq. The implication of this comment is that Michigan lacks legal authority to regulate sources as necessary to implement the 2015 Ozone NAAQS, as required by CAA sections 110(a)(2)(A) and 110(a)(2)(E)(i).

Response: EPA disagrees with the commenter's concern that the Michigan Court of Claims decision in *United States Steel Corp. v. Dept. of Environmental Quality*, indicates that Michigan lacks legal authority to regulate sources as required by CAA sections 110(a)(2)(A) and 110(a)(2)(E)(i). As an initial matter, EPA notes that the state court decision at issue pertained to implementation of the 2010 1-hour primary SO_2 NAAQS, not the 2015 Ozone NAAQS. For most purposes, EPA normally evaluates infrastructure SIP submissions for purposes of the specific NAAQS that is at issue. In this instance, however, the implications of the state court decision could potentially affect the state's ability to implement control measures with respect to other NAAQS as well.

In this light, EPA has evaluated whether the Michigan Court of Claims decision in question precludes the state from regulating specific sources as needed for purposes of meeting

nonattainment plan requirements to result in attainment and maintenance of the NAAQS. Based on this review, EPA concludes that the court only decided that the state had improperly sought to impose emissions controls on the sources at issue through a rule that did not meet state law requirements for a "rule of general applicability" in violation of relevant state administrative procedures act requirements. By naming the specific affected source by name, rather than drafting the requirements in a form that would apply to all similar sources in the state, the court reasoned that the state law could not pass muster as a rule of general applicability.

Instead, the court reasoned that the objective the state sought to achieve "sounds more in the nature of that which is ordinarily only allowed after a contested case hearing or in the permit process." Moreover, the court noted that it was "not unmindful of the facts that led to the promulgation of Rule 430 or situation that DEQ sought to address." Although the court expressly declined to advise how the state could properly impose emission limits on the source at issue via other means, elsewhere in the decision the court noted that the state and other sources "agreed to revise pertinent DEQ permits."

EPA interprets these statements by the court to indicate that the state does have authority under Michigan law to impose necessary emission limitations on sources, as required to meet CAA requirements, via other legal mechanisms such as permits. EPA notes that in order to meet CAA SIP requirements, such as

nonattainment plan requirements, the state would need to submit the emission limitations and other related permit terms (e.g., monitoring, reporting, and record keeping requirements) to EPA for approval into the federally enforceable SIP for Michigan. In addition, to the extent that the state prefers to proceed via generally applicable state regulations rather than permits, EPA expects that Michigan will draft future rules to avoid the concerns raised by the court which resulted in invalid SO_2 limits and make necessary efforts to implement the 2015 Ozone NAAQS via other means consistent with state law and meeting CAA requirements for SIP provisions. Although the commenters expressed concern that the decision of the court in *United States Steel Corp. v. Dept. of Environmental Quality* indicated that the state lacks requisite authority to implement its SIP consistent with CAA requirements, EPA does not interpret the decision so broadly.

Additionally, EPA also disagrees with the commenter that Michigan's SIP does not include "enforceable emission limitations and other control measures... as may be necessary or appropriate to meet the applicable requirements" CAA section 110(a)(2)(A) with respect to the 2015 ozone NAAQS more broadly. As stated in the July 2, 2021 proposed rule (86 FR 35247), under Part 55 of the Natural Resources Protection Act, (PA 451) promulgated in 1994, Michigan Compiled Laws (MCL) Sections 324.5503 and 324.5512 authorize the EGLE director to regulate the discharge of air pollutants, to create rules and to

establish standards regarding air quality and emissions. Specifically, MCL Section 324.5503 states "*The department may ... Promulgate rules to establish standards for ambient air quality and for emissions ... Issue permits ... subject to enforceable emission limitations and standards and other conditions reasonably necessary to assure compliance with all applicable requirements of this part, rules promulgated under this part, and the clean air act.*" and MCL Section 324.5512 states "*(1) ... department shall promulgate rules for purposes of doing all of the following: (a) Controlling or prohibiting air pollution. (b) Complying with the clean air act...*"

Michigan also imposes emission limits for ozone precursors in MAC Rules 336.1101 through 336.2908. Specifically, MAC Rules 336.1601 through 336.1661 apply to existing sources of volatile organic compounds (VOC), Rules 336.1701 through 336.1710 apply to new sources of VOCs, and Rules 336.1801 through 1834 apply to oxides of nitrogen (NO_X) from stationary sources. Methods of control and compliance are contained within these rules and incorporate EPA's New Source Performance Review standards and NO_x budget trading program. Further, sources in Michigan that install equipment that will emit ozone precursors are subject to permit-to-install regulations under MAC Rules 336.1201 through 336.1209 and include consideration of VOCs and NO_X. Prevention of Significant Deterioration (PSD) program regulations (MAC Rules 336.2801 through Rule 336.2823) require any new major or

modified source to undergo PSD review.[1] EPA believes the emission limits for ozone and its precursors contained in these rules, in conjunction with the authorization to promulgate rules to assure compliance with the CAA in MCL Sections 324.5503 and 324.5512, satisfy the requirements of CAA section 110(a)(2)(A) with respect to infrastructure SIP requirements for purposes of the 2015 ozone NAAQS.

Lastly, EPA reiterates that Michigan has provided necessary assurances that it has "adequate ... authority under State ... law to carry out the implementation plan ... and is not prohibited by any Provision of Federal or State law, from carrying out such implementation plan." As EPA noted in the July 2, 2021, proposed rule (86 FR 35247), EGLE stated in the SIP submission that it has the legal authority to carry out the Michigan SIP under Act 451 and the Executive Reorganization Order 2011-1. In addition, EGLE indicated that MCL 324.5503 provides it with authority to enforce the Michigan SIP. Specifically, MCL 324.5503(f) gives EGLE the power to enforce permits, air quality fee requirements, and the requirements to obtain a permit, while 324.5503(g) gives EGLE the authority to institute proceedings to compel compliance. EGLE also provided a delegation letter in the submission from the Governor to the EGLE director that delegates authority to EGLE to "... make any submittal, request, or application under the federal CAA,

[1] Effective February 16, 2017 (82 FR 5182), EPA updated the modeling appendix at 40 CFR part 51, appendix W. EPA proposed approval of Michigan Part 9 rules on March 24, 2021 (86 FR 15837), incorporating the CFR update. The finalization of the rule update will dictate finalization of this element.

including the ability to carry out SIP requirements." This letter is included in the docket of this ruling. Therefore, EPA believes that Michigan has met the infrastructure SIP requirements of section 110(a)(2)(A) and 110(a)(2)(E)(i) with respect to the 2015 Ozone NAAQS.

This action amends the regulatory text to correct the effective date of our final approval to reflect our response to these additional comments, in addition to correcting the CFR citation to reflect that EGLE's submission meets the requirements of Section 110(a)(2)(E)(i), which was detailed in the July 2, 2021, proposed approval (86 FR 35247), but mistakenly omitted in the CFR table.

Section 553 of the Administrative Procedure Act, 5 U.S.C. 553(b)(B), provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. We have determined that there is good cause for making this rule final without prior proposal and opportunity for comment because we are merely correcting incorrect element approval citations and incorrect effective date citations in the related previous actions to address mistakenly omitted comments.

Statutory and Executive Order Reviews.

This action is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR

3821, January 21, 2011). This action does not impose an information collection burden under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Because the agency has made a "good cause" finding that this action is not subject to notice-and-comment requirements under the Administrative Procedures Act or any other statute as indicated in the Supplementary Information section above, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C 601 *et seq.*), or to sections 202 and 205 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4). This action will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of governments, as specified by E.O. 13132 (64 FR 43255, August 10, 1999). In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by E.O. 13175 (65 FR 67249, November 9, 2000). This action is not subject to E.O. 13045 (62 FR 19885, April 23, 1997), because it is not economically significant. This action is also not subject to E.O. 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001). This

technical correction action does not involve technical standards; thus the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. The action also does not involve special consideration of environmental justice related issues as required by E.O. 12898 (59 FR 7629, February 16, 1994).

This action is subject to the Congressional Review Act (CRA), and EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. Section 808 allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and public procedure is impracticable, unnecessary or contrary to the public interest. This determination must be supported by a brief statement. 5 U.S.C. 808(2). As stated previously, EPA had made such a good cause finding, including the reasons therefore, and established an effective date of **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. This correction to 40 CFR part 52 for Michigan is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: May 12, 2022.

Debra Shore,
Regional Administrator, Region 5.

For the reasons stated in the preamble, EPA amends 40 CFR part 52 as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

2. In § 52.1170, the table in paragraph (e) is amended by revising the entry for "Section 110(a)(2) infrastructure requirements for the 2015 ozone NAAQS" to read as follows:

§ 52.1170 Identification of plan.

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(e) * * *

EPA-APPROVED MICHIGAN NONREGULATORY AND QUASI-REGULATORY PROVISIONS

Name of nonregulatory SIP provision	Applicable geographic or nonattainment area	State submittal date	EPA Approval date	Comments
* * *	* *	* *		
Infrastructure				
* * *	* *	* *		
Section 110(a)(2) infrastructure requirements for the 2015 ozone NAAQS	Statewide	3/8/2019	**[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], [INSERT FEDERAL REGISTER CITATION]**	Approved CAA elements: 110(a)(2)(A), (B), (C), (D)(i)(II) Prong 3, D(ii), (E)(i), (F), (G), (H), (J), (K), (L), and (M). Disapproved CAA element 110(a)(2)(D)(i)(II) Prong 4. No action on CAA element 110(a)(2)(D)(i)(I) and 110(1)(2)(E)(ii).
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[FR Doc. 2022-10671 Filed: 5/18/2022 8:45 am; Publication Date: 5/19/2022]